The Bargaining Unit Status of Academic Department Chairmen

American labor laws recognize an intermediate position between high-level management and rank and file employees. Although the National Labor Relations Board, the courts, and state agencies have had a great deal of difficulty determining which employees possess sufficient managerial authority to occupy this intermediate "supervisor" position, they have managed to identify a number of factors to be taken into account in making this determination. Recently, courts and boards have had to apply their past learning on the identification of supervisors to the academic world. Organizational activity among university and public school teachers has increased significantly in recent years,¹ and in 1970 the National Labor Relations Board decided for the first time to hear labor relations disputes arising in an academic context.² There is considerable disagreement, however, as to whether department chairmen should be included in the teachers' bargaining unit or excluded as supervisors.

The term "department chairman," like the term "supervisor," does not have a standard definition applicable in all circumstances. Chairmen may be elected by other teachers or appointed by administrators, may hold their positions for brief periods in rotation or for extended terms, and may have few or many functions different from those of other teachers. Typically, however, department chairmen devote only a small proportion of their time to administrative duties and spend the bulk of their time performing the same functions as other teachers. Moreover, many of the decisions the chairman makes are arrived at after consultation, both formal and informal, with fellow teachers in the department.³

¹ Approximately 10 percent of the nation's 2,550 universities, colleges, and junior colleges now have formal collective bargaining agreements. N.Y. Times, March 25, 1973, § 1, at 36, col. 1. On unionization in higher education, see generally Bloustein, *Unionization in Academe*, N.Y. Times, Feb. 2, 1973, at 29, col. 3; BNA GOVERNMENT EMPLOYEE RELATIONS REPORTER No. 414, at B-15 (1971) [hereinafter cited as GOV'T EMP. REL. REP.]; GOV'T EMP. REL. REP. No. 478, at B-4 (1972) (statistics on union affiliations); Brown, *Collective Bargaining in Higher Education*, 67 MICH. L. REV. 1067, 1081 (1969); McHugh, *Collective Bargaining with Professionals in Higher Education: Problems in Unit Determination*, 1971 WIS. L. REV. 55; Wollett, *The Status and Trends of Collective Negotiations for Faculty in Higher Education*, 1971 WIS. L. REV. 2, 3.

² Cornell University, 183 N.L.R.B. No. 41, 74 L.R.R.M. 1269 (1970).

³ On the roles of university department chairmen, see Brief for Petitioner at 15-29,

Teachers' organizations have asked federal and state labor boards to adopt rules for classifying department chairmen different from those used in the nonacademic context, arguing, in part, that teachers are capable of performing their professional duties without supervision and that the chairman is essentially an equal who represents his colleagues to the administration.⁴ While such rules for classifying department chairmen have not yet been adopted, many teachers and school administrators regard determination of the chairman's status as a matter of special importance, since it is likely to determine whether his primary allegiance is to his colleagues or to the administration.⁵ This comment discusses the major factors involved in the statutory, judicial, and administrative determination of the status of academic department chairmen and suggests certain criteria for making this determination.

Post Hearing Brief for Employer at 9-18, Adelphi Univ., 195 N.L.R.B. No. 107, 79 L.R.R.M. 1545 (Feb. 29, 1972); Brief for Petitioner at 51-78, Brief for Employer at 12-24, Reply Brief for Petitioner at 13-18, Fordham Univ., 193 N.L.R.B. No. 23, 78 L.R.R.M. 1177 (Sept. 14, 1971); P. DRESSSEL, F. JOHNSON & P. MARCUS, *THE CONFIDENCE CRISIS* (1970); Finkin, *Collective Bargaining and University Government*, 1971 Wis. L. Rev. 125, 126. On the roles of gradeschool chairmen, see Internal Memoranda of The University of Chicago Laboratory High School, *The Role of Department Chairman*, Oct. 13, 1971, Nov. 1, 1971, Jan. 2, 1972 (copies on file at *The University of Chicago Law Review*).

The literature on university governance is extensive. See generally AMERICAN ASSOCIATION FOR HIGHER EDUCATION, *FACULTY PARTICIPATION IN ACADEMIC GOVERNANCE* (1967); J. BALDRIDGE, *POWER AND CONFLICT IN THE UNIVERSITY: RESEARCH IN THE SOCIOLOGY OF COMPLEX ORGANIZATIONS* (1971); J. BARZUN, *THE AMERICAN UNIVERSITY* (1968); POWER AND AUTHORITY: *TRANSFORMATION OF CAMPUS GOVERNANCE* (H. Hodgkinson & L. Meeth eds. 1971); R. MCGEE, *ACADEMIC JANUS: THE PRIVATE COLLEGE AND ITS FACULTY* (1971).

⁴ The National Education Association (NEA) and the American Association of University Professors (AAUP) have argued that teachers are independent professionals needing no supervision: department chairmen do not supervise teachers' activities and should, therefore, be included with other teachers in a single bargaining unit. T. STINNETT, J. KLEINMANN, & M. WARE, *PROFESSIONAL NEGOTIATION IN PUBLIC EDUCATION* 157-63 (1966); *Statement on Government of Colleges and Universities*, in *ACADEMIC FREEDOM AND TENURE: A HANDBOOK OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS* (G. Joughin ed. 1969). By contrast, the American Federation of Teachers (AFT) stresses the employment aspect of the teacher's role and has argued for the exclusion of all supervisory personnel. Kugler, *The Union Speaks for Itself*, 49 EDUCATIONAL RECORD 414 (1968). In fact, however, locals of both the NEA and the AFT are free to determine their own positions on this issue, and there has been a trend in recent years for NEA locals to adopt the more militant position of the AFT. R. DOHERTY & W. OBERER, *TEACHERS, SCHOOL BOARDS, AND COLLECTIVE BARGAINING: A CHANGING OF THE GUARD* 60-66 (1967); E. SHILS & C. WHITTIER, *TEACHERS, ADMINISTRATORS, AND COLLECTIVE BARGAINING* 251, 544 (1968); T. STINNETT, J. KLEINMANN, & M. WARE, *supra*. On union positions generally, see Brown, *Collective Bargaining on the Campus: Professors, Associations and Unions*, 21 Lab. L.J. 167 (1970); Brown, *supra* note 1; Council of the AAUP, *Council Position on Collective Bargaining*, 58 AAUP BULL. 46 (1972).

⁵ Cf. Board of the Junior College, Dist. 508, Chicago & Local 1600, AFT, 120 AAA 8 (1968), in *ARBITRATION CASES IN PUBLIC EMPLOYMENT* 91, 98 (E. Tracy ed. 1969); Finkin, *supra* note 3, at 140-41.

I. THE STATUTORY FRAMEWORK

The problem of identifying supervisory personnel is difficult, recurrent, and important. The identification determines whether an individual will enjoy the right to vote in a union election and be entitled to protection against unfair labor practices, rights guaranteed to nonsupervisory employees but not to supervisors.⁶

A. Supervisors and the National Labor Relations Act

The Taft-Hartley Act of 1947, which amended the National Labor Relations Act (NLRA), incorporated a definition of supervisor separate from those of employee and employer.⁷ Section 2(11) of the NLRA now defines supervisor as: "any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment." This definition was intended to identify employees so closely allied with management that employers should not be compelled by law to bargain over their treatment and rank and file employees should not be forced to allow them to participate in making certain decisions, such as selection of bargaining representatives.⁸

In attempting to implement the NLRA's special treatment of supervisors, the NLRB and reviewing courts have found that if an employee exercises any one of the powers set forth in section 2(11) he may have sufficient managerial authority to be classified as a supervisor.⁹ At the same time, the Board and courts have recognized that even if an em-

⁶ 29 U.S.C. §§ 152(11), 157, 158(a)(1) (1970); AMERICAN BAR ASSOCIATION, *THE DEVELOPING LABOR LAW* 773-74 (C. Morris ed. 1971).

⁷ 29 U.S.C. § 152(11) (1970). Section 2(12), 29 U.S.C. § 152(12) (1970) of the Taft-Hartley Act also included professional employees within the definition of employees set forth in section 2(3), 29 U.S.C. § 152(3) (1970). However, section 9(b)(1) directed the Board not to find appropriate a unit that "includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit." 29 U.S.C. § 159(b)(1) (1970).

⁸ The House report on the Taft-Hartley Act stated: "[N]o one, whether employer or employee, need have as his agent one who is obligated to those on the other side, or one whom, for any reason, he does not trust." H.R. REP. NO. 245, 80th Cong., 1st Sess. 17 (1947), *reprinted* in 1 *LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947* 308 (1948) (emphasis in original).

⁹ *NLRB v. Security Guard Servs., Inc.*, 384 F.2d 143, 146 (5th Cir. 1967); *Ohio Power Co. v. NLRB*, 176 F.2d 385, 387 (6th Cir.), *cert. denied*, 338 U.S. 899 (1949); *NLRB v. Edward G. Budd Mfg. Co.*, 169 F.2d 571, 576 (6th Cir. 1948), *cert. denied*, 335 U.S. 908 (1949).

ployee has one of those powers, his duties may, on the whole, be so similar to those of other employees in his unit that he neither poses a special threat to a union of fellow workers nor is he of special importance to management. A strawboss or leadman who merely acts as a conduit for management orders will not be categorized as a supervisor.¹⁰ Some ability to make or influence management decisions is required; an employee who is found to possess such ability, whether or not he exercises it regularly, is a supervisor within the NLRA's definition.¹¹ The criterion to which the Board has generally paid greatest attention is the authority to hire or fire employees or effectively to recommend hiring or firing.¹²

Review of the individual's possession of the powers listed in section 2(11) of the NLRA, however, is seldom an endpoint for the Board. While the law gives a broad outline for ascertaining supervisory status, "the gradations of authority . . . are so infinite and subtle that of necessity [determinations involve] a large measure of informed discretion"¹³ In addition to the powers exercised by or delegated to the employee, the Board has, in close cases, taken into account a wide variety of factors, including other employees' opinions that the individual is a supervisor,¹⁴ the formal title accorded the employee,¹⁵ and the fact that he receives a higher salary than other employees.¹⁶ Similarly, in determining whether individuals performing different tasks should be included within a single bargaining unit,¹⁷ the Board and courts have

¹⁰ *Amalgamated Clothing Workers v. NLRB*, 420 F.2d 1296, 1300 (D.C. Cir. 1969); *Keener Rubber, Inc. v. NLRB*, 326 F.2d 968, 969 (6th Cir.), *cert. denied*, 377 U.S. 934 (1964).

¹¹ *NLRB v. Leland-Gifford Co.*, 200 F.2d 620, 625 (1st Cir. 1952); *Ohio Power Co. v. NLRB*, 176 F.2d 385, 388 (6th Cir. 1949). The employee may also be characterized as a "managerial employee" and denied protection under the NLRA. *See Textron, Inc. v. NLRB*, 82 L.R.R.M. 2753 (2d Cir. Feb. 28, 1973), and cases cited therein.

¹² *See NLRB v. Security Guard Servs., Inc.*, 384 F.2d 143, 148 (5th Cir. 1967); *W. Horace Williams Co.*, 130 N.L.R.B. 223, 47 L.R.R.M. 1337 (1961); *AMERICAN BAR ASSOCIATION*, *supra* note 6, at 773.

¹³ *NLRB v. Swift and Co.*, 292 F.2d 561, 563 (1st Cir. 1961), *quoted with approval in NLRB v. Security Guard Servs., Inc.*, 384 F.2d 143, 146 (5th Cir. 1967), and *Warner Co. v. NLRB*, 365 F.2d 435, 437 (3d Cir. 1966).

¹⁴ *W.T. Grant Co.*, 195 N.L.R.B. No. 183, 79 L.R.R.M. 1670 (Mar. 22, 1971).

¹⁵ *NLRB v. Security Guard Servs., Inc.*, 384 F.2d 143, 150 (5th Cir. 1967), and cases cited therein.

¹⁶ *NLRB v. Security Guard Servs., Inc.*, 384 F.2d 143, 146 (5th Cir. 1967); *NLRB v. Griggs Equip., Inc.*, 307 F.2d 275, 279 (5th Cir. 1962).

¹⁷ The National Labor Relations Act speaks only of "the unit appropriate for the purposes of collective bargaining." 29 U.S.C. § 159(b) (1970). This has been read to mean that the Board does not have to find the most appropriate unit, only one which qualifies as an appropriate unit. *Bowman v. Hackensack Hosp. Ass'n*, 116 N.J. Super. 260, 277, 282 A.2d 48, 57 (1971); *Morand Bros. Beverage Co.*, 91 N.L.R.B. 409, 418, 26 L.R.R.M. 1501, 1506 (1950). *See also Rains, Determination of the Appropriate Bargaining Unit by the*

looked to the commonality of employee interests, the previous bargaining history of the unit, and the relation of the unit to the operation and organization of the employer's business.¹⁸

B. Supervisors and Government Employee Unions

For many years it was commonly believed that the difference between private industry and public employment was great enough to render many of the features of private sector collective bargaining wholly inapplicable to the public sector.¹⁹ In recent years, however, the right of public employees to organize has gained increasing legal recognition. Although federal and state governments are excluded from the definition of employers under the National Labor Relations Act,²⁰ Executive Order 10988,²¹ promulgated in 1962 and amended by Executive Order 11491 of 1969,²² grants employees of the federal government the right to join labor organizations. It directs federal agencies to meet with organizations that have achieved exclusive recognition "and confer in good faith with respect to personnel policies and practices and matters affecting working conditions"²³ The order specifically excludes supervisors from such employee organizations unless supervisors traditionally have been included in the organization or the agency consents to such inclusion.²⁴ Since the executive orders have been widely copied by state legislatures, the supervisory classification is important

NLRB: A Lack of Objectivity Perceived, 8 B.C. IND. & COM. L. REV. 175, 177-81 (1967). Moreover, as one commentator stated: "[T]he determination of an appropriate unit is at least as much a political decision as a legal or statutory one . . . in the sense that the determination itself, which consists of grouping or separating people for decision-making purposes, is by nature an exercise in political science." Hall, *The Appropriate Bargaining Unit: Striking a Balance Between Stable Labor Relations and Employee Free Choice*, 18 CASE W. RES. 479, 481 (1967).

¹⁸ See AMERICAN BAR ASSOCIATION, *supra* note 6, at 221-22; 15 NLRB ANN. REP. 39 (1950).

¹⁹ See *Fursman v. Chicago*, 278 Ill. 318, 326, 116 N.E. 158, 160 (1917). See also *Norwalk Teachers' Ass'n v. Board of Educ.*, 138 Conn. 269, 276, 83 A.2d 482, 485 (1951) (teachers may organize but may not strike).

²⁰ 29 U.S.C. § 152(2) (1970).

²¹ 3 C.F.R. 521 (1959-1963 Comp.).

²² 3 C.F.R. 861 (1966-1970 Comp.), as amended, Exec. Order No. 11,616, 3 C.F.R. 202 (1971 Comp.).

²³ Exec. Order No. 11,491, 3 C.F.R. 861, § 11(a) (1966-1970 Comp.). Section 9 of the order grants to labor organizations that have not achieved exclusive recognition the right to present their views on personnel policies in writing and to request meetings with representatives of the government agency concerned.

²⁴ *Id.* §§ 10(b)(1), 24(a), (d). The definition of supervisor contained in section 2(c) of the order is identical to that in section 2(11) of the NLRA except that it includes among the enumerated functions of a supervisor the authority to evaluate the performance of employees. Section 7(e) of the order also provides for intramanagement communication between agencies and supervisor, or associations of supervisors.

to department chairmen in public schools as well as to chairmen in private institutions now covered by the NLRA.

A number of state legislatures have recently adopted public employee statutes²⁵—statutes that, in contrast to the NLRA, narrowly restrict the scope of permissible bargaining. The situation of supervisors in the public sector often differs significantly from that of supervisors in private industry, since public sector supervisors are often covered by the same leave system, the same pension plans, and the same operating rules as other public employees.²⁶ This results in a greater tendency to include, where permissible, public sector supervisors in the same unit with regular employees. Despite these considerations, some state statutes draw heavily on the definitions and provisions of the NLRA and exclude supervisors from coverage,²⁷ while others extend protection to supervisors but exclude them from regular employee units.²⁸ In general, state public employee statutes do not define the term “supervisor” or its equivalent with any precision, and some do not define it at all.²⁹

II. DEPARTMENT CHAIRMEN AND THE DETERMINATION OF SUPERVISORY STATUS

A limited number of cases deal with the status of department chairmen, and since all of them concern issues of unit determination rather than unfair labor practice charges the opinions of the boards and courts are based on the assessment of potential rather than the determination of actual conflicts of interests. Despite the variation in governing statutes, the manners in which the NLRB and state labor relations boards have approached this problem display many similarities.

²⁵ Copies of these statutes are collected in BNA GOVERNMENT EMPLOYEES RELATIONS REPORTER REFERENCE FILE 51:1111 *et seq.* [hereinafter cited as GOV'T EMP. REL. REF. FILE]. See also Smith, *State and Local Advisory Reports on Public Employment Labor Legislation: A Comparative Analysis*, 67 MICH. L. REV. 891 (1969); AMERICAN BAR ASSOCIATION, *Report of Committee on State Labor Law*, GOV'T EMP. REL. REF. No. 310, E-1 (1969).

²⁶ See W. HART, *COLLECTIVE BARGAINING IN THE FEDERAL CIVIL SERVICE* 184 (1961).

²⁷ *E.g.*, Kansas, GOV'T EMP. REL. REF. FILE, *supra* note 25, 51:2513, at § 5 (1972); Wisconsin, *id.*, 51:5813, at § 111.82 (1972), GOV'T EMP. REL. REF. *supra* note 1, No. 250, at B-1 (1968).

²⁸ *E.g.*, Idaho, GOV'T EMP. REL. REF. FILE, *supra* note 25, 51:2112, at § 2(1) (1971); Hawaii, *id.*, 51:2013, at § 6 (1971).

²⁹ Several model state public employee acts have been drafted in recent years by the Advisory Commission on Intergovernmental Relations. These bills would exclude supervisors from collective bargaining or meet and confer privileges, supervisors being defined in essentially the same terms as the NLRA. State Public Employee-Management “Meet and Confer” Act, GOV'T EMP. REL. REF. FILE, *supra* note 25, 51:211-16 (1970); State Public Employee-Management “Collective Negotiations” Act, *id.*, 51:217-24 (1970).

A. Decisions of the National Labor Relations Board

Prior to 1970 the NLRB refused to assert jurisdiction over private nonprofit universities "where the activities involved are noncommercial in nature and intimately connected with the charitable purposes and educational activities of the institution."³⁰ In 1970, however, the Board found that nonprofit colleges and universities often have a significant impact on interstate commerce and reversed its blanket refusal to assert jurisdiction over such institutions.³¹ In order to establish an appropriate jurisdictional standard, the Board issued a formal rule asserting jurisdiction over private nonprofit universities and colleges that have a gross annual revenue from all sources (except restricted contributions) of at least \$1 million.³²

The first case in which the NLRB was called upon to determine the status of department chairmen was *C.W. Post*.³³ The petitioners, an affiliate of the United Federation of Teachers, sought to exclude chairmen from the unit while the university wanted both chairmen and regular teachers to be categorized as supervisors. Neither the union, the university, nor the Board's general counsel argued that identification of supervisors in an educational institution should be governed by special

³⁰ Trustees of Columbia Univ., 97 N.L.R.B. 424, 427, 29 L.R.R.M. 1098, 1099 (1951). Drawing a line between commercial and noncommercial activity proved difficult. *Compare* Woods Hole Oceanographic Institution, 143 N.L.R.B. 568, 53 L.R.R.M. 1296 (1963), M.I.T. (Lincoln Laboratory), 110 N.L.R.B. 1611, 35 L.R.R.M. 1297 (1954), and California Institute of Technology, 102 N.L.R.B. 1402, 31 L.R.R.M. 1435 (1953) (jurisdiction asserted) with Armour Research Foundation, 107 N.L.R.B. 1052, 33 L.R.R.M. 1311 (1954) (jurisdiction denied).

³¹ Cornell Univ., 183 N.L.R.B. No. 41, 74 L.R.R.M. 1269 (1970). The extent to which Board jurisdiction may be exercised "is a matter of administrative policy within the Board's discretion . . ." *NLRB v. WGOK, Inc.*, 384 F.2d 500, 502 (5th Cir. 1967); *Von Solbrig Hosp. v. NLRB*, 465 F.2d 173 (7th Cir. 1972).

³² 29 C.F.R. § 103.1 (1972). This was the first time the NLRB issued a formal rule. The power to make rules is granted the Board in 29 U.S.C. § 156 (1970). Significant state or local involvement in a private institution may, however, exempt that institution from coverage under the million dollar rule because it is an arm of the state within the meaning of section 2(2) of the NLRA. *Compare* Temple Univ., 194 N.L.R.B. No. 195, 79 L.R.R.M. 1196 (Jan. 19, 1972) (jurisdiction denied) with Minneapolis Soc'y, 194 N.L.R.B. No. 55, 78 L.R.R.M. 1609 (Nov. 30, 1971) (jurisdiction asserted). Jurisdiction has also been asserted over a nonprofit corporation operating an in-residence secondary school with a gross annual revenue of more than \$1 million. *Shattuck School*, 189 N.L.R.B. No. 118, 77 L.R.R.M. 1164 (April 19, 1971). However, it is well-established that local public school boards do not come within the definition of "employer" under section 2(2) of the NLRA. *The Children's Village, Inc.*, 197 N.L.R.B. No. 135, 80 L.R.R.M. 1747, 1749 (June 30, 1972) and cases cited therein at n.4. It has, however, been argued that public institutions should not be exempt from coverage. Comment, *NLRB Jurisdiction over Private Colleges and Universities—Toward Elimination of the Good Works Exclusion*, 44 TEMP. L.Q. 410 (1971).

³³ 189 N.L.R.B. No. 109, 77 L.R.R.M. 1001 (Apr. 20, 1971).

rules, and, perhaps because of this, the Board simply decided to apply its already established principles for determining supervisory status. The Board found that, although full-time faculty members of C.W. Post made some decisions affecting the salary, tenure, and working conditions of fellow faculty members, this decision making power was insufficient to render them supervisors under section 2(11), since these decisions were made by the entire department.³⁴ The Board held, however, that department chairmen who interviewed and discussed employment terms with potential faculty members and made recommendations to the deans concerning the departmental budget and promotion or dismissal of other teachers, were supervisors³⁵ even though the Board's opinion did not indicate whether these responsibilities were, in the *C.W. Post* case, of any practical importance.³⁶

A number of faculty associations were concerned about the *C.W. Post* decision. When the same question arose in the *Fordham* case one of these associations, the American Association of University Professors (AAUP), attempted, by means of evidence, expert testimony, and a detailed brief, to convince the Board that chairmen should not be categorized as supervisors under section 2(11).³⁷ By a vote of two to one the Board agreed that department chairmen at Fordham should be included in the faculty unit. The Board noted that all the members of a department advised the chairman and consented to any recommendations he made and that chairmen lacked final authority, their recommendations being subject to approval by administration officials. The Board attached no significance to the chairman's 10 percent salary bonus and lighter teaching load, but did accord some weight to the fact that chairmen regarded themselves, and were regarded by their colleagues, as regular faculty members and were not listed as administrators in the catalogue or designated as the persons to whom newly appointed faculty are responsible.³⁸ The Board dismissed the importance of the chairman's power to make recommendations on hiring,

³⁴ 189 N.L.R.B. No. 109, 77 L.R.R.M. 1001, 1003 (Apr. 20, 1971); *accord*, Fordham Univ., 193 N.L.R.B. No. 23, 78 L.R.R.M. 1177, 1180 (Sept. 14, 1971).

³⁵ 189 N.L.R.B. No. 109, 77 L.R.R.M. 1001, 1004 (Apr. 20, 1971). Associate and assistant deans, however, were found not to be supervisors. The Board also held that chairmen should be excluded as supervisors at another campus of the university despite the fact that all parties sought to include them. Long Island Univ. (Brooklyn Center), 189 N.L.R.B. No. 110, 77 L.R.R.M. 1006 (April 20, 1971).

³⁶ The only indication of the effect of the chairmen's recommendations was the Board's statement that "[o]n occasion the dean does not accept their [budget] recommendations." 189 N.L.R.B. No. 109, 77 L.R.R.M. 1001, 1004 (Apr. 20, 1971).

³⁷ See Brief for Petitioner at 51-78, Fordham Univ., 193 N.L.R.B. No. 23, 78 L.R.R.M. 1177 (Sept. 14, 1971).

³⁸ 193 N.L.R.B. No. 23, 78 L.R.R.M. 1177, 1183 (Sept. 14, 1971).

promotion, and tenure, finding that any weight accorded such recommendations was based on respect for the chairman's personal ability and experience, and did not indicate that he possessed supervisory authority.³⁹ The Board further concluded that Fordham chairmen did not possess the power effectively to recommend salary increases, but it did so without indicating how often these recommendations were followed or if the power of chairmen varied from one department to another. The majority distinguished *C.W. Post* on the grounds that C.W. Post faculty members needed their chairman's approval before taking any outside work, the catalogue listed the chairmen as members of the administration, the university rules stated that deans act on the recommendations of the chairmen, and the chairman's recommendation was specifically required before a tenure decision could be made by the tenure committee.⁴⁰ Member Kennedy, dissenting in part, found the two cases indistinguishable, arguing that, as a practical matter, the Fordham chairmen had considerable influence on appointments, promotions, and decisions concerning tenure.⁴¹ Neither the majority nor the dissent discussed the precise nature of the chairman's power to make recommendations nor did either opinion indicate what factors controlled the disposition of the case.

In *Adelphi*, its third major case concerning department chairmen, the Board decided to exclude department chairmen because they "have the authority effectively to recommend the hire and reappointment (or nonreappointment) of all *part-time* faculty members, and to allocate merit increases, without the approval of the department's faculty."⁴² The Board also held that members of the tenure committee were not supervisors because tenure decisions were reached through the same process as all other decisions of faculty committees and were subject to the final authority of the Board of Trustees.⁴³ Again, the Board did not specify precisely what constitutes the "power effectively to recommend"

³⁹ *Id.* at 1182.

⁴⁰ *Id.* at 1183 n.19.

⁴¹ *Id.* at 1184.

⁴² 195 N.L.R.B. No. 107, 79 L.R.R.M. 1545, 1549 (Feb. 29, 1972) (emphasis added). The Board further stated that "[i]nasmuch as this authority is sufficient to constitute chairmen supervisors, we need not consider or decide whether, absent this authority, they would be within the statutory definition." *Id.* at 1549 n.10. The NLRB has consistently included part-time faculty in the bargaining unit. E.g., Manhattan College, 195 N.L.R.B. No. 23, 79 L.R.R.M. 1253 (Jan. 25, 1972); Fordham Univ., 193 N.L.R.B. No. 23, 78 L.R.R.M. 1177 (Sept. 14, 1971). At least one state board, however, has excluded part-time faculty from the unit. City Univ., 2 N.Y. PUBLIC EMPLOYEES RELATIONS BOARD ¶ 3000 (1968) [hereinafter cited as N.Y. P.E.R.B.]. The inclusion of part-time (adjunct) faculty is again before the NLRB in the New York University and Fairleigh Dickinson cases.

⁴³ 195 N.L.R.B. No. 107, 79 L.R.R.M. 1545, 1556 (Feb. 29, 1972).

or how much "final authority" must be exercised before a faculty member would be classed as a supervisor.⁴⁴ By stressing the issue of part-time faculty and the nonsupervisory nature of decisions reached by faculty groups as a whole, the decision lends support to arguments for the general inclusion of department chairmen even though these factors led to the exclusion of Adelphi chairmen from faculty units.

B. Decisions by State Public Employee Boards

Few state public employee statutes specifically mention teachers and still fewer explicitly refer to university personnel. In determining the status of department chairmen, state boards act, therefore, under broad provisions concerning all public employees and generally have not developed clear standards for dealing with this problem.

1. *University Chairmen.* The most detailed decision by a state board on the question of university chairmen is that of the New York Public Employee Relations Board in the *State University of New York* case.⁴⁵ The decision was reached under the provisions of the Taylor law, section 207(1) of which permits public employees to form units whose members share a community of interests. Instead of the term "supervisor," the New York law excludes "managerial" and "confidential" employees from protection under the statute;⁴⁶ these categories are defined respectively as employees in policy making positions and employees who are privy to managerial information.⁴⁷ Specifically, the New York board held that in the S.U.N.Y. system department chairmen, as well as assistant and associate deans, are not managerial personnel and may, therefore, be included in the faculty unit. The board found that: "[M]eaningful or effective supervisory authority is exercised by fellow faculty members as well as high executive officials who have already been excluded as management. No reasonable basis appears, therefore, for excluding members of the professional service on the ground that they supervise the faculty. . . . [T]he managerial ex-

⁴⁴ More recent cases have also failed to indicate where the line should be drawn. The Board has held that a chairman cannot be excluded simply because he discusses certain terms of employment with prospective faculty. *Florida S. College*, 196 N.L.R.B. No. 133, 80 L.R.R.M. 1160 (May 3, 1972). The Board has also stressed that where final authority rests with higher officials chairmen will not be designated supervisors. *Tuculum College*, 199 N.L.R.B. No. 6, 81 L.R.R.M. 1345, 1347 (1972); *University of Detroit*, 193 N.L.R.B. No. 95, 78 L.R.R.M. 1273, 1275 (Oct. 6, 1971).

⁴⁵ 2 N.Y. P.E.R.B., *supra* note 42, ¶ 4010 (Aug. 12, 1969).

⁴⁶ GOV'T EMP. REL. REP. REF. FILE, *supra* note 25, 51:4111, at §§ 201(7), 202, 203 (1971). This exclusion has been held constitutional in *Shelofsky v. Helsby*, 39 App. Div. 2d 168, 332 N.Y.S.2d 723 (1972).

⁴⁷ GOV'T EMP. REL. REP. REF. FILE, *supra* note 25, 51:4111, at § 201(7) (1971).

clusion in the instant case must be confined within narrow bounds."⁴⁸

Although the reasoning in the New York decision may be of limited applicability where statutes eliminate supervisors rather than managerial personnel from the category of protected employees, it supports the view that faculty members are self-governing to such an extent that small increments of additional authority granted any one faculty member do not necessarily destroy the community of interests he shares with his colleagues.⁴⁹ Under the New York board's view, department chairmen—and even assistant and associate deans⁵⁰—share decision making power with the faculty on labor relations matters and are not, therefore, so different from regular faculty members that their inclusion in the faculty unit would pose a threat to either the faculty or the administration.

Similar results have been reached in Michigan and Rhode Island decisions. The Michigan board held that chairmen at Southwestern Michigan College should be included in the faculty unit because there was no evidence that the recommendations of the chairmen were "effective," a term the board did not define. Absent such a showing, "the mere existence of periodic or occasional evaluation . . . is not in itself sufficient basis for a determination that [the chairmen] are supervisors within the law."⁵¹ The Rhode Island board declined to find that chairmen were supervisors where the functions of teachers and chairmen are alike.⁵² While the New York, Michigan and Rhode Island decisions reflect the increasing inclination of state boards to include university department chairmen in faculty units, the number of state

⁴⁸ 2 N.Y. P.E.R.B., *supra* note 42, ¶¶ 4010, 4183 (Aug. 12, 1969).

⁴⁹ As Cardozo stated: "The governing body of a university makes no attempt to control its professors and instructors as if they were its servants. By practice and tradition, the members of the faculty are masters and not servants. . . . They have the independence appropriate to a company of scholars." *Hamburger v. Cornell*, 240 N.Y. 328, 336-37, 148 N.E. 539, 541 (1925).

⁵⁰ 2 N.Y. P.E.R.B., *supra* note 42, ¶¶ 4010, 4183 (Aug. 12, 1969). In affirming the inclusion of assistant and associate deans, the appellate court noted that although some (unspecified) conflict of interest between the deans and the faculty may arise from the former's supervisory duties, decisive weight should nevertheless be accorded the fact that, unlike higher officials, deans do not so much set policy as implement it. *Wakshull v. Helsby*, 35 App. Div. 2d 183, 185, 315 N.Y.S.2d 371, 373 (1970).

⁵¹ *Southwestern Mich. College, Mich. Labor Mediation Board Case No. R68 E-174* (Jan. 22, 1968), Gov't EMP. REL. REP. REF. *supra* note 1, No. 282, at B-7 (1969).

⁵² In contrast to other opinions in this field the Rhode Island board further noted that "there is a difference of opinion between the department chairmen as to the proper manner and method of operating the various departments." *State of Rhode Island and Providence Plantations, Board of Regents and URIPA and AAUP, R.I. State Labor Relations Board Case No. EE-1961* (Oct. 19, 1971), Gov't EMP. REL. REP. *supra* note 1, No. 428, at B-1 (1971).

board decisions on university chairmen is too small to permit any general conclusions.

2. *Public School Chairmen.* State board decisions on the status of elementary and high-school chairmen are more numerous than those dealing with the status of university chairmen, and a review of available decisions indicates a broader range of approaches to the problem. For example, the Pennsylvania statute distinguishes among public employees who carry out only routine supervision (supervisors) and may, therefore, join employee units; those who exercise some discretionary power (first level supervisors) and are entitled only to meet and confer separately with the administration; and those who make policy or have access to restricted information (managerial and confidential personnel) and are denied all coverage under the statute.⁵³ Chairmen have been found to be first level supervisors because, even though their primary function is teaching, they make recommendations in matters of curriculum, textbooks, employee selection and retention, and budget allocations.⁵⁴ In New Jersey, however, the state board has found chairmen to be supervisors only if 50 percent or more of their time is devoted to supervisory tasks.⁵⁵ In New York, department chairmen, and even school principals,⁵⁶ have been categorized as employees rather than managerial personnel but have been required to form separate bargaining units.⁵⁷ The New Jersey board has permitted chairmen to belong to the teachers' unit even though they are supervisors if there has been

⁵³ GOV'T EMP. REL. REP. REF. FILE, *supra* note 25, 51:4714, at § 704 (1970).

⁵⁴ North Hills School Dist., Pa. Labor Relations Board, Case No. PERA-R-757-W (July 21, 1971), GOV'T EMP. REL. REP., *supra* note 1, No. 420, at B-7 (1971); *accord*, Carlisle Area School Dist., Case No. PERA-R-272-C (June 23, 1971), *id.*, No. 410, at B-1 (1971).

⁵⁵ City School Dist. of Newark (Nov. 23, 1964) (Hildebrand, Moderator), at 3-4, *cited in* M. LIEBERMAN & M. MOSKOW, *COLLECTIVE NEGOTIATIONS FOR TEACHERS* 147 (1966). Boards in several other states have applied the fifty percent rule to other school personnel. *See, e.g.*, Minnesota cases applying the rule to assistant principals, *cited in* GOV'T EMP. REL. REP., *supra*, note 1, No. 482, at C-2-7 (1972).

⁵⁶ Board of Educ., Beacon Enlarged School Dist., 4 N.Y. P.E.R.B., *supra* note 42, ¶ 4024 (Dec. 8, 1971). This decision has been criticized in Rains, *Collective Bargaining in the Public Sector and the Need for Exclusion of Supervisory Personnel*, 23 LAB. L.J. 275, 276-77 (1972). *Compare* Editorial, N.Y. Times, Feb. 27, 1973, at 34, col. 2, arguing that principals should be regarded as managers *with* reply by officer of Council of Supervisors and Administrators, N.Y. Times, March 30, 1973, at 38, col. 4. On the role of principals in bargaining units generally, see M. MOSKOW, *TEACHERS AND UNIONS* 141 (1966); Redfern, *Negotiation Changes Principal-Teacher Relationships*, in *PROFESSIONAL NEGOTIATION AND THE PRINCIPALSHIP* 51-59 (1969).

⁵⁷ Board of Educ. of Enlarged City School Dist. of Troy, 4 N.Y. P.E.R.B., *supra* note 42, ¶¶ 4014, 4322 (Aug. 12, 1971).

a prior history of inclusion,⁵⁸ while other state boards have summarily included or excluded chairmen from the bargaining unit.⁵⁹

State board decisions on the status of school and university chairmen thus rely on the same range of factors that are found in the NLRB decisions: bargaining history, percentage of time devoted to supervising, power to recommend, and so forth. Like NLRB decisions, the state board opinions contain little reference to the evidence presented, insufficient consideration of the meaning or implications of the criteria referred to, and no clear indication of the weight attached to each of the functions performed by department chairmen.⁶⁰

III. DETERMINING THE BARGAINING STATUS OF DEPARTMENT CHAIRMEN

The unionization of teachers is still in its formative stage; the decisions of legislatures, labor boards, and reviewing courts can affect not only the positions of the department chairmen involved, but the ways in which schools and universities structure their internal governance. In making these decisions it is possible both to protect workers'

⁵⁸ Henry Hudson Regional School Dist., N.J. Public Employees Relations Comm'n, E.D. No. 12, Docket No. CU-11, Gov't EMP. REL. REP., *supra* note 1, No. 363, at B-9 (1970).

⁵⁹ City of Pittsfield, Mass. Labor Relations Comm'n, Case No. MCR-18, Gov't EMP. REL. REP. No. 168, at B-1, B-3 (May 17, 1966) (department heads and teachers may form one unit); Waussau Dist. 15 (Apr. 8, 1971) (Bellman, Arbitrator) in Arbitration in the Schools, Report No. 19 (Sept. 1, 1971), item No. 19-U-12, at 5. See also Krislov & Peters, *The Arbitration of Grievances in Educational Units in the Late 1960's*, 23 LAB. L.J. 25 (1972).

In some instances the parties themselves have sought to resolve the question of the chairman's status in the bargaining agreement. *E.g.*, Schenectady Community College Faculty Ass'n, 4 N.Y. P.E.R.B., *supra* note 42, ¶¶ 4008, 4309 (May 17, 1971) (chairmen excluded by consent). The New York board has expressed its reluctance in permitting the inclusion by consent of gradeschool chairmen in the teachers' unit. E. Irondequoit Cent. School Dist., *id.*, ¶ 399.66, at §198 (Oct. 9, 1968). Few statistics are available on the actual composition of bargaining units. In Illinois, the following figures have been reported for the composition of bargaining units in schools where collective bargaining agreements were in effect in 1971-1972: teachers only, 113; teachers and department heads, 104; teachers and principals, 4; teachers and paraprofessionals, 15. Illinois Association of School Boards, *What's in 1971-1972 Teacher Collective Contracts in Illinois?*, at 1 (April 13, 1972) (copy on file at *The University of Chicago Law Review*).

⁶⁰ Several teachers' unions have proposed legislation covering collective bargaining in public education. The National Education Association proposal, introduced as S. 951, 91st Cong., 1st Sess. (1965) by Senator Metcalf, would have conferred organizational and strike privileges on all those employed in a professional educational capacity, except for the superintendent of schools or other chief executive officer. Gov't EMP. REL. REP. FILE, *supra* note 25, 51:223 (1969). However, no action was taken on the bill. The American Federation of Teachers prepared a brief model collective bargaining bill which was never formally introduced. The AFT admitted that "it is extremely difficult to prepare a model collective bargaining bill which we could recommend without reservations." *Id.* at 51:241 (1970).

rights and to preserve traditional, collegial modes of governing academic institutions. This section attempts to identify the kinds of factors to which the boards and courts should accord decisive weight in working toward both of these goals.

A. NLRB Determinations of the Status of University Chairmen

1. *Procedural Approaches.* The NLRB has frequently been criticized for failing to use its rule making powers.⁶¹ Critics argue that the formulation of rules pursuant to the Administrative Procedure Act⁶² would give certainty, uniformity, and regularity to the decisions of the Board and would allow concerned parties to base their actions on a rational appreciation of the legal consequences. Such rules, however, can also create solutions to abstract problems that may be overly rigid when applied to actual situations.⁶³ It would be difficult to formulate any meaningful rule sufficiently flexible to apply equitably to the many different department chairmen, spending widely differing amounts of time exercising divergent powers with different and often uncertain effects. The Board recognized this in rejecting the AAUP petition to form a rule on the status of department chairmen.⁶⁴ But, although a rule would not be appropriate, the present form of Board decisions is also inadequate. The Board seldom indicates what factors have been decisive for its holdings; instead the opinions list a host of factors, ranging from the power to hire to the way in which chairmen are listed in the university catalogue, without specifying the weight it attaches to them.⁶⁵ Moreover, without reading the lengthy reports of the trial

⁶¹ *Hearings on Congressional Oversight of Administrative Agencies Before the Subcomm. on the Separation of Powers of the Senate Comm. on the Judiciary*, 90th Cong., 2d Sess., pt. 1, at 917 (1968) (remarks of Judge Friendly) [hereinafter cited as *1968 Hearings*]; Peck, *The Atrophied Rule-Making Powers of the National Labor Relations Board*, 70 YALE L.J. 729 (1961); see Shapiro, *The Choice of Rule Making or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. (1965). See generally, K. DAVIS, ADMINISTRATIVE LAW TREATISE § 6.13 (Supp. 1970). The Board has been severely criticized for misusing the methods of adjudication for rule making. *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969).

⁶² The rule making provisions of the Administrative Procedure Act are at 5 U.S.C. §§ 533, 559 (1970).

⁶³ See Bernstein, *The NLRB's Adjudication—Rule Making Dilemma under the Administrative Procedure Act*, 79 YALE L.J. 571, 612 (1970).

⁶⁴ AAUP, Committee N, *The National Labor Relations Board and Faculty Representation Cases*, 57 AAUP Bull. 433 (1971). The AAUP did not, however, propose a specific rule. Indeed, the AAUP was particularly interested in using the rule making procedure as a vehicle for informing the Board of the special nature of university governance. *Id.* at 437.

⁶⁵ "[The Board] is timid in a number of ways. It doesn't state the grounds of what it is doing, it doesn't explain itself. It has a passion for what it views as case-by-case decision-making; that is to say, simply state the facts and without really attempting to come to

examiners or studying the briefs submitted, it is difficult to know the facts on which the NLRB's decision was premised.⁶⁶ The Board could correct these failings without abandoning its case by case approach by detailing which facts control the determination of a chairman's status and which factors are relevant in the particular case.

2. *Controlling Factors.* Section 2(11) of the NLRA states that a supervisor is one who has the authority to use independent judgment in carrying out, in the interest of the employer, one of the enumerated supervisory functions. In determining the status of department chairmen, the crucial factor is the extent to which the chairman performs one of these supervisory tasks independently of the rest of the faculty. If, in fact, the chairman must seek the advice and consent of his colleagues before making recommendations to the dean, then, even if the dean follows these recommendations on all or most occasions, the decision has actually been made by the department as a whole and the chairman has exercised no separate supervisory power. Indeed, if it can be shown that the faculty, and not the administration, has granted the chairman the right to make decisions on its behalf, it would be equally clear that the chairman has acted as the agent of the employees rather than of the employer.

On the other hand, if the chairman consults with his colleagues but is neither bound by their decision nor specifically empowered to act on their behalf, then he is clearly in a position to exercise his own judgment in matters relating to their working conditions. Under such circumstances it is irrelevant how often the dean follows his recommendations: unless the teachers know that the chairman's suggestions are unlikely to be followed, they will be reluctant to express themselves in his presence, for example, on labor relations issues because of the adverse effect it may have for the chairman's recommendations on their own tenure, salary, or other benefits. It is, therefore, unsound to rest a determination of the chairman's status solely on the ground that "final authority" to make decisions is vested in higher administration officials. The central inquiry must be whether there is sufficient evidence to indicate that the chairman has power himself to make decisions affecting the status or working conditions of his colleagues and, if so, whether his authority derives from his colleagues or from the administration. The Board should presume that a chairman who exercises one of the enumerated functions might so affect a teacher's salary, class assign-

grips with concrete issues, say, 'We think on all the facts and circumstances this is the answer.'" 1968 *Hearings*, *supra* note 61, at 528 (remarks of Professor Lesnick).

⁶⁶ Bernstein, *supra* note 63, at 576.

ments, teaching schedule, choice of materials, and so on that his presence at unit meetings during his tenure in office might be detrimental to the effective representation of the workers.

In addition to showing that a chairman has the authority to perform supervisory tasks independent of his colleagues, it must also be shown that the chairman exercises these functions "in the interest of the employer." If it can be demonstrated that under certain circumstances the interests of the administration and the organized teachers diverge and that the chairman is capable of using his position to further the employer's interest over that of his colleagues, that showing should be sufficient to meet the interest of the employer requirement. For example, the administration of a university may wish to perpetuate the "star system," in which a few prominent professors receive high salaries and light teaching loads while junior faculty receive wages that are disproportionately low for the heavy teaching schedules they are assigned. The teachers' unit may, therefore, wish to adopt as its bargaining position a limit on course hours and a salary scale that permits no individual bargaining. A chairman who favors the "star system" and who has the power to recommend salary raises without receiving the advice and consent of his colleagues may, as a member of the unit, pose a threat to full and open discussion of the matter. The possession of such a power, rather than its use, is important. Therefore, whether the chairman in fact expends his main efforts in the interests of his colleagues, the fact that he could act against their interest should be considered sufficient to meet this criterion of supervisory status.

In determining the status of department chairmen the Board can safeguard academic traditions and protect employees from interference in their organizational affairs by evaluating each case in the light of the following propositions:

a. If the chairman is subject to dismissal from his post by his colleagues, it should be presumed that any powers he exercises do not rise to the level of independence necessary to establish him as a supervisor under section 2(11).

b. If the chairman makes decisions on any significant matters affecting the working conditions of fellow teachers on which he is not bound by his colleagues' vote, it should be presumed that he does exercise the independent judgment required for categorization as a supervisor under section 2(11).

c. If the chairman's recommendations to higher administrative officials on significant matters affecting the working conditions of fellow teachers are ever effective, it should be presumed that employees will necessarily treat him at all times as if his recommendations might prove

effective. Unless this presumption is rebutted, the existence of such power should be sufficient to render the chairman a supervisor under section 2(11).

By applying these criteria on a case by case basis, the Board can remain responsive to the distinctive characteristics of each situation and place the burden of proof of noninterference on those whose functions and relationships give evidence of managerial alignment.

B. State Board Determinations of the Status of School Chairmen

The situation in the public school differs from that of private universities because of the public nature of the operation and because the functions of chairmen are often more clearly defined. Highschool chairmen tend to stay in office for much longer periods of time—often for a decade or more—and have more clearly prescribed duties than their university counterparts. Moreover, the chairman's status may have a greater impact in public school labor relations than in most universities because school teachers are more restricted than college instructors in what and how they teach and more dependent on the formal evaluations of their chairmen. Whenever the chairman is actually required to evaluate the performance of teachers—regardless of the amount of time devoted to this task—he will pose a potential threat to the teachers' unit deliberations.

While the public school situation is more amenable to solution by a flat rule than the university chairman problem, the factors and presumptions proposed above for NLRB determinations on the status of department chairmen are equally applicable in the public school context and their use would retain flexibility to respond to unusual situations. If the chairman performs supervisory tasks, such as evaluating teachers, independently of the faculty as a group, he should not be included in the teachers' unit. By applying explicit standards, responsive to actual situations, state labor relations boards will encourage local school boards to decide exactly what tasks they want their chairmen to perform, will put the negotiating parties on notice as to how the matter will be handled in the absence of a negotiated agreement on the issue, and will continue to protect teachers from interference with their organizational rights.

SUMMARY

Despite its special characteristics, conflicts of interest arise in academic institutions that necessitate consideration of many of the same factors and implications found in other employment contexts. Moreover, the preservation of true collegial decision making and effective

unit operation are not antithetical goals. State and federal boards properly regard chairmen who are found to exercise any independent power over the employment status or working conditions of their colleagues as supervisors. By specifying exactly why, in any particular case, the powers of the chairman conform to this standard, the boards can leave to the principal parties the task of structuring their own internal governance while preserving the rights of teachers to form appropriate collective bargaining units.

Lawrence Rosen